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In The

Supreme Court of the United States

BOY SCOUTS OF AMERICA AND
MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

v.

JAMES DALE,

Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF AMICUS CURIAE, THE INDIVIDUAL RIGHTS FOUNDATION, IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Petitioners Boy Scouts of America and Monmouth Council, Boy Scouts of America ("Petitioners" or "Boy Scouts") and Respondent James Dale ("Respondent" or "Dale") have each consented to the filing of this amicus curiae brief[1] by the Individual Rights Foundation ("IRF").

The IRF was founded in 1993 and is dedicated to educating the public about the importance of the First Amendment's free speech and associational guarantees. To further its educational goals, the IRF conducts seminars and other public events, publishes newsletters, and files amicus curiae briefs in appellate cases involving First Amendment speech and associational rights issues. The IRF seeks to resist attempts from anywhere along the political spectrum to limit public expression because such attempts pose a serious threat both to cultural diversity and to our free form of government.

STATEMENT OF THE CASE

This amicus adopts the Statement of the Case set forth in Petitioners' Brief on the Merits ("Petitioner's Brief").[2] Nonetheless, the IRF wishes to highlight a few points in the record below.

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[1] Counsel of record, Paul A. Hoffman, authored this amicus curiae brief in its entirety. No person or entity, outside of amicus curiae, The Individual Rights Foundation, its members or its counsel of record, has made a monetary contribution to the preparation or submission of the present amicus curiae brief. The written consents of Petitioners and Respondent have been filed with the Clerk of the Court.

[2] Numbers preceded by "JA" refer to the Joint Appendix being filed with the Petitioners' Brief on the Merits; numbers followed by "a" refer to pages in the Appendix submitted with the Petition for Writ of Certiorari; numbers preceded by "R." refer to pages in the record before the New Jersey Supreme

The Record Below

It is important at the outset to focus on what is not contained in the record below. There is no evidence that Boy Scouts bar anyone based on mere status, unannounced and unbroadcasted, as homosexuals. The record below reveals that Boy Scouts are not interested in the *private* sexual status of any of their adult leaders, but only in their *public* expressions regarding sexuality, which may affect their ability to effectively teach or role model *Scouting's* beliefs regarding traditional morality. (JA 460) This is shown by Dale's own admission that he is "aware of other homosexuals active in Scouting against whom no adverse action has been taken because they have not 'gone public' with their sexual orientation." (160a) This finding is consistent with Boy Scouts' position that "Boy Scouting makes no effort to investigate the sexual orientation of members or leaders." (P.4 n.2) Nor is there any evidence in the record below that Boy Scouts ever asked Dale or any other applicant about his or her private sexual life.

What the record below does show is that Boy Scouts' membership policies are concerned with *public expression*. Boy Scouts' policy excludes only "avowed homosexuals." (JA 138) Boy Scouts were interested in Dale's *public* statements and conduct only because of the obvious impact such behavior would have on his ability to serve as a role model for Scouting's preferred values. (207a; 223a)

Citing an extensive review of material, the Superior Court of New Jersey, Chancery Division ("Chancery Division"), expressly found that "from its inception Scouting has excluded from membership and adult leadership any person *who openly declares* himself a homosexual and that such policy has continued unchanged, to the present. . . . It is the firm position of BSA that [homosexual] conduct

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Court; numbers preceded by "P." refer to the Petition for Writ of Certiorari.

is not 'morally straight' under the Scout Oath nor is it 'clean' under the Scout Law." (192a (emphasis added))

There is no evidence in the record that anyone in Boy Scouts knew of Dale's homosexuality, or would likely ever have known, but for Dale's extraordinary efforts to *publicly broadcast* his views as a homosexual advocate to a reporter for *The Newark Star-Ledger*, who identified Dale as Co-President of the Rutgers University Lesbian/Gay Alliance. (JA 517) Boy Scouts became aware of Dale's homosexuality solely as a result of his voluntary newspaper interview. (JA 753) Thus, had Dale not taken efforts to *publicize* his views as a homosexual, his membership in Boy Scouts would not have been revoked. Based thereon, the Chancery Division ruled that Boy Scouts could revoke his membership.

Ruling Of Appellate Courts Below

The Superior Court of New Jersey, Appellate Division, reversed in a split decision (Landau, J., dissenting), concluding, among other things, that: (1) Boy Scouts of America is a place of public accommodation within the meaning of the New Jersey Law Against Discrimination ("LAD") (124a); (2) enforcement of the LAD is unrelated to the suppression of ideas because it will not significantly affect Boy Scouts' ability to carry out expressive purposes (136a); and (3) Boy Scouts failed to show that the policy of excluding avowed homosexuals was a collective viewpoint that brought members together. (143a-144a)

The New Jersey Supreme Court ("NJSC") affirmed, by ruling, among other things, as follows:

> We find that the LAD does not violate Boy Scouts' freedom of expressive association because the statute *does not have a significant impact on* Boy Scout members' ability to associate with one another in *pursuit of shared views*. The organization's ability to disseminate its message is not significantly affected by Dale's

> inclusion because: Boy Scouts *members do not associate for the purpose of disseminating the belief that homosexuality is immoral*; Boy Scouts discourages its leaders from disseminating any views on sexual issues; and *Boy Scouts include sponsors and members who subscribe to different views in respect of homosexuality*.

Dale v. Boy Scouts of America, 160 N.J. 562, 612, 734 A.2d 1196 (1999) (emphasis added).

SUMMARY OF ARGUMENT

Your amicus respectfully submits that several constitutional errors by the NJSC require reversal by this Court in order to avoid serious erosion of the freedoms of speech and expressive association:

(1) The NJSC's decision below erroneously concluded that discrimination based on self-identifying *speech* is the same as discrimination based on status. However, under this Court's First Amendment jurisprudence, the fact that homosexual "coming out" speech is "self-identifying speech" does not grant the State of New Jersey a greater right to regulate the content of private speech or diminish the right of expressive associations to exclude those whose self-identifying speech is contrary to their expressive purposes.

(2) Scout leader role modeling constitutes symbolic speech and expressive conduct under *Texas v. Johnson*, 491 U.S. 397 (1989) because the record below shows that Boy Scouting intends to and does effectively convey specific messages and values (i.e., the principles embodied in the Boy Scout Oath and Law) by means of role modeling. Boy Scouts' role modeling is founded on the belief that a Scout leader's example is more effective than the spoken word in transmitting moral values to young Scouts.

Therefore, requiring the appointment of someone whose public example runs counter to the organization's values alters both the form and content of Boy Scouts' intended speech and constitutes state suppression of free expression.

(3) The NJSC mistakenly held that only those messages in which an expressive association shares a "single view" which functions as "a unifying associational goal of the organization" can justify exclusion of those representing contrary viewpoints. Limiting the right of expressive association to only those few viewpoints that bring the entire membership together would not only eviscerate this Court's opinion in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), but would all but destroy the right of expressive association for large associations, including political parties, which cannot meet this test.

(4) A narrow interpretation of the rights of speech and expressive association in this case will adversely affect the right of all Americans, including gays and lesbians, to engage in expressive activities and will actually discourage legislators from expanding civil rights laws for fear of negatively impacting the expressive interests of a whole host of social and cultural associations.

ARGUMENT

I. THE NJSC'S JUDGMENT MUST BE REVERSED BECAUSE IT FAILS TO PROTECT THE BOY SCOUTS' FIRST AMENDMENT RIGHT OF SPEAKER'S AUTONOMY AND ERRONEOUSLY CONCLUDES THAT BOY SCOUTS' IDEOLOGICALLY-RELATED REJECTION OF RESPONDENT DALE BASED ON DALE'S PUBLIC SELF-IDENTIFYING SPEECH WAS MERE DISCRIMINATORY CONDUCT BASED ON DALE'S STATUS

The NJSC's opinion attempts to distinguish the facts presented in this case from this Court's ruling in *Hurley v.*

Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557 (1995), by stating that "Dale's status as a scout leader is not equivalent to a group marching in a parade" and that Boy Scout leadership is not a "form of 'pure speech' akin to a parade." *Dale, supra*, 160 N.J. at 623. However, the applicability of the speech principles announced in *Hurley* cannot be so easily dismissed.[3]

Since homosexuality is generally a latent characteristic, unlike race and gender[4], homosexuals who wish to openly proclaim their homosexuality must, by definition, *send a message* to others. Such a message constitutes speech and is inherently expressive. *See, e.g.*, Nan D. Hunter, et al., *The Rights of Lesbians and Gay Men: The*

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[3] The NJSC's opinion tries to distinguish *Hurley* because "Dale does not come to Boy Scout meetings 'carrying a banner.' " *Dale, supra*, 160 N.J. at 623. The NJSC's cramped reading of *Hurley leads to a strange anomaly*: Only if Boy Scouts obtain a permit and march in a *parade* may they lawfully exclude leaders, like Dale, who may want to wear a sign in such a parade stating "I am a gay Scoutmaster," but Boy Scouts may not lawfully exclude those same individuals at any other Scouting event, such as a Scout-O-Rama, a Boy Scout Jamboree, or a Scout meeting, who may stand and announce that "I am a gay Scoutmaster." These examples suggest that the speech principles announced in *Hurley* are broad and cannot be limited to just one narrow category of speech (i.e., parades).

[4] "Homosexuality is . . . behavioral and hence is fundamentally different from traits such as race, gender, or alienage. . . . " *High Tech Gays v. Defense Ind. Sec. Clearance Office*, 895 F.2d 563, 573 (CA9 1990). *See also* William B. Rubenstein, *Since When Is the Fourteenth Amendment Our Route to Equality? Some Reflections on the Construction of the 'Hate-Speech' Debate from a Lesbian/Gay Perspective*, in *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, And Civil Liberties* 283 (1994) ("sexual orientation is not, like race or gender, visually identifiable: individuals must take on a lesbian/gay identity through some speech or speech act known as 'coming out' ").

Basic ACLU Guide to a Gay Person's Rights 9 (3d ed. 1992) (*"coming out speech ought to be recognized by the courts as political expression"*) (emphasis added); Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. Det. Mercy L.Rev. 189, 326-27 (1999) (" *'Coming out' is* profoundly personal and *highly political.*") (emphasis added); William David Cole & William N. Eskridge, *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 Harv. C.R.-C.L. L.Rev. 319, 325 (1993) ("An *admission of sexual identity is expressive* in the strictest sense of the word.") (emphasis added); Jose Gomez, *The Public Expression of Lesbian/Gay Personhood As Protected Speech*, 1 Law & Ineq. J. 121 (1983).[5]

A variety of messages arise from "coming out" speech, from social defiance to the viewpoint that the homosexual lifestyle is normal and acceptable. *See, e.g.*, Andrew J. Breuner, *Expression By Association: Towards Defining An Expressive Association Defense In Unruh-Based Sexual Orientation Discrimination Actions*, 33 Santa Clara L.Rev. 467, 510 (1993) ("it seems that an individual's decision to publicly express his or her sexuality *is a personal affirmation that such conduct is legitimate or acceptable*") (emphasis added); William N. Eskridge, *Gaylegal Narratives*, 46 Stan. L.Rev. 607, 635-36 (1994) (*"decision to come out is* not merely an individual assertion of identity, but also *a risky act of social defiance"*) (emphasis added).

The issue of whether a direct burden would be placed on Boy Scouts' First Amendment rights by forcing

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[5] Dale's counsel of record, Evan Wolfson, even admits that there are "inherently political dimensions to being *openly* gay or lesbian." (Evan Wolfson & Robert S. Mower, *When the Police Are In Our Bedrooms, Shouldn't The Courts Go In After Them?: An Update On The Fight Against "Sodomy" Laws*, 21 Fordham Urb. L.J. 997, 1025 n.100 (1994) (emphasis added).)

them to accept Dale's speech, not just his status, is most clearly raised in *Hurley*. The parade organizers in *Hurley* represented that they reflected "traditional religious and social values" and wished to exclude "groups with sexual themes." *Hurley*, 515 U.S. at 562. Although participation by the Irish-American Gay, Lesbian & Bisexual Group of Boston ("GLIB") was also expressive in character, *id.* at 570, the only *public* message manifested at the parade by GLIB was its own *self-identifying speech*, when it "marched behind a shamrock-strewn banner with the simple inscription 'Irish American Gay, Lesbian and Bisexual Group of Boston.' " *Id.* Based on these facts, this Court concluded that GLIB had sought to "communicate its ideas as part of the existing parade." *Id.* This alone was enough to find an implied message that conflicted with the wishes of the parade organizers. The same conflict is inherent in the present case.

Openly gay persons who apply to be Scoutmasters when they know that Boy Scouts take a position against alternative sexual lifestyles[6] are, in essence, *requesting that Boy Scouts accept their political message or speech*, not just their sexual orientation status. When public accommodation statutes, however well intentioned, are used to require acceptance, the state is clearly compelling acceptance of private political speech, directly contrary to this Court's holding in *Hurley*. As stated by Judge Landau in his dissent below in the Superior Court, Appellate Division: "This principle is not changed merely because the altered message is implicitly, but no less strongly, conveyed by example rather than by verbal articulation or by

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[6] For example, it is hardly disputable that Boy Scouts have the right to reject other messages or speakers who seek to use Scouting as a vehicle to "legitimize" other sexual lifestyles, such as prostitution, polygamy, adultery or unmarried heterosexual cohabitation.

signs." (153a) Accordingly, the present case plainly raises the issue of whether the rule of "speaker's autonomy" established by this Court in *Hurley* is being threatened by misapplication of state public accommodation laws.

Moreover, the seriousness of the threat to private speech rights in this case is not abated by the counter-argument that, since homosexuals are known almost exclusively by their self-identifying speech, or because homosexual status cannot be separated from homosexual speech, therefore, a homosexual person cannot be excluded based on his or her "coming out" speech. *See, e.g., Dale, supra*, 160 N.J. at 641 (concurring opinion of Justice Handler).[7] This argument only begs the very question at issue in this case: whether Dale's self-identifying *speech* is interfering with Boy Scouts' free speech and association rights.

Speech is speech, whether it is self-identifying speech or some other type of speech. Accordingly, if homosexual status really cannot be separated from homosexual self-identifying speech, then forcing expressive associations opposed to the homosexual lifestyle to accept openly homosexual persons is also, *a priori*, forcing them to accept such persons' speech, thereby violating the association's right of speaker's autonomy. Unless this Court is willing to carve out a new exception to First Amendment jurisprudence for self-identifying speech, it seems self-evident that homosexuals do not have a special right above other Americans to compel private expressive associations to accept their speech.

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[7] This counter-argument clearly fails if carried to its logical conclusion. For example, most Catholics also cannot be identified other than by their self-identifying speech. However, this fact does not give them a right to join a Protestant or Jewish fraternal organization.

By the same token, if homosexual status truly cannot be separated from homosexual speech, then an expressive association's rejection of an openly homosexual person is not necessarily based on a rejection of such person's status. It may be legitimately based on rejection of the message of such person's "coming out" speech. Accordingly, one of the basic assumptions on which rests much of the reasoning of the NJSC's ruling, that Boy Scouts revoked Dale's membership "solely because of his status as a homosexual" (160 N.J. at 624), is very doubtful.

Moreover, the risk that Dale's speech interferes with Boy Scouts' right of speaker's autonomy is especially grave in this case because of the NJSC's conclusion that "Boy Scouts expresses a belief in moral values and uses its activities to encourage the moral development of its members." (160 N.J. at 613.) Thus, it is undisputed that the NJSC found that Boy Scouts are at least expressive with respect to "moral values" and the "moral development of its members."

Since the issue of the morality of homosexual behavior is highly controversial, the likelihood of interference with Boy Scouts' expressive purposes arising from Dale's public self-identifying speech is extremely high in this case. That likelihood is further increased in this case because of the fact that Dale has actively promoted his message in the media, announcing that he is a "gay activist" and "very active in gay politics" as co-president of the Rutgers University Lesbian and Gay Alliance. (JA 468-469, 511, 513, 515-518) Dale is also openly critical of Boy Scouts' role modeling policy: "I owe it to the organization to point out to them *how bad and wrong this policy is*. . . . " (JA 513) (Emphasis added.)

Accordingly, this Court should exercise its obligation to independently review the record and reverse the judgment of the NJSC based upon the Court's finding that

Boy Scouts' rejection of Dale was not simply an act of prohibited discrimination based on status but is logically related to exclusion of ideological speech which may inherently subvert Boy Scouts' own expression in favor of the moral values they prefer.

II. BOY SCOUTS' UNIQUE EMPHASIS ON TEACHING BY EXAMPLE AND BY ROLE MODELING IS ITSELF A FORM OF SYMBOLIC SPEECH OR EXPRESSIVE CONDUCT PROTECTED BY THE FIRST AMENDMENT

In addition to violating the Boy Scouts' right of speaker's autonomy by requiring Boy Scouts' acceptance of Dale's self-identifying speech, the NJSC's judgment also alters or limits Boy Scouts' own affirmative speech communicated through the medium of role modeling.

In *Hurley, supra*, this Court stated that "the Constitution looks beyond written or spoken words as mediums of expression." 515 U.S. at 569. For example, parading is expressive because it is not simply movement from one place to another but is a form of "making some sort of collective point, not just to each other but to bystanders along the way." *Id.* at 568.

Because expressive *conduct*, and not just words, convey a message which constitutes speech, the First Amendment protects expressive associations which limit the content of their speech by their choice of role models. Common examples of such expressive activity include appointment of church ministers and youth counselors, who often teach more *by their example* than by their preaching.

In *Texas v. Johnson*, 491 U.S. 397, 403-405 (1989), this Court reiterated its two-part test for determining whether a state regulation, as applied to conduct alleged to be expressive, violates the First Amendment: (1) whether the

conduct itself is expressive, as shown by an intent to convey a particularized message which is likely to be understood by those viewing it, and (2) if so, whether the state's interest in regulating such conduct is "related to the suppression of free expression."

With respect to the first prong of *Texas v. Johnson*, the record below reveals a strong case for finding expressive conduct because there can be little doubt that *Boy Scouting intends to convey a particularized message (i.e., the principles embodied in the Boy Scout Oath and Law) through its choice of role models* and that "the likelihood was great that the message would be understood by those who viewed it." *Id.* at 404 (citing *Spence v. Washington*, 418 U.S. 405, 410-411 (1974)). The communicative intent of Boy Scouts is clearly stated in their Mission Statement: "It is the mission of Boy Scouts . . . *to instill* values in young people. . . . The values we strive *to instill* are based on those found in the Scout Oath and Law." (JA 184 (emphasis added))

Boy Scouts control the messages and values instilled in young Scouts, in part, by excluding individuals who would *express views or model behavior contrary to Scouting's views*. The Chancery Division below expressly found that "*Scoutmasters are* teachers and *role models* of 'what a man should be like' *in all aspects* of male adulthood." (207a (emphasis added)) It further found that "[t]o be an adult leader of Scouting one must agree to be bound not only by the Scout Oath or Promise but also by the Declaration of Religious Principles." (206a) Such a leader "must possess the moral, educational, and emotional qualities deemed necessary by BSA for leadership before he will be commissioned." (222a) The Chancery Division concluded that requiring Dale to be admitted as a Scout leader "would be devastating to the essential nature of scouting" partly because a role model's example is "critical" to

Scouting's mission of conveying the values of the Scout Oath and Law. (223a) These facts clearly show that there is an *intent* by Boy Scouts to communicate a *specific message* through role modeling.

The record below also shows a great likelihood that those viewing the conduct would understand the message. Boy Scout literature is replete with statements that boys best *understand* the message of Scouting through role modeling. The Official Scoutmaster Handbook, which Dale had when he registered as a Scout leader, stated:

> In his quest for manhood, every boy needs contact with men *he can copy*. Living, breathing men provide *models* of what manhood is like. *Boys copy whatever models are available to them. . . .* You are providing a good *example* of what a man should be like. What you do and *what you are* may be worth a thousand lectures and sermons.

(JA 543) (Emphasis added.) The Handbook further stated: "*What you are* speaks louder than what you say." (*Id.*) (Emphasis added.) The Scoutmaster Handbook also advises Scout leaders: "When you're on a Scout campout, remember that *boys will look up to you as a role model – someone they want to* respect and *copy*." (R.2685) (emphasis added). "Boys learn from the *example* set by their adult leaders." (JA 244) (emphasis added).

Recognizing the power of example on young Scouts, Dale himself admitted that it was his responsibility "to set an example of living by the Scout oath and law. . . . " (R.3333) He also admitted that, in order to effectively instill Scouting values in youth, it is important for a Scout leader "*never to do or say anything inconsistent* with the values embodied in the Scout Oath or the Scout Law." (JA 120) (emphasis added).

Evidence in the record indicated the drastic effect that admission of known or avowed homosexuals would

have on the communicative aspects of role modeling and on young Scouts' *understanding* of what it means to be morally straight and clean. (JA 447-449) Professor Slavings described the various mechanisms by which adult leaders' role modeling contributes to value transmission and showed how each method would be weakened and disrupted if someone like Dale were placed in the position of adult leader. (*Id.*) These facts show that young Scouts *understand* the messages[8] of Scouting's role models.

Since the record below shows that Boy Scouts' role modeling is clearly expressive in character, the second prong of *Texas v. Johnson* requires a determination "whether the State's regulation is related to the suppression of free expression." 491 U.S. at 403. If the state's interest is related to suppression of ideas, then strict scrutiny is the standard of review. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Even a regulation which is intended to vindicate a compelling state interest must be shown to be "unrelated to the suppression of free expression" and "the incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest." *Id.*

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[8] Evidence of the fact that Boy Scouts' role modeling sends a message that is understood by those receiving it is virtually admitted in writings posted on the website of Dale's own legal representative, Lambda Legal Defense and Education Fund ("Lambda"). In an article entitled "Ford Foundation Adds to Support for Gay Youth," dated October 1, 1999, Lambda's Executive Director, Kevin Cathcart, states with specific reference to this case: "The outrage of *the Boy Scout policy* is not just that it bars openly gay people from scouting, but also that it *sends a message to all youth. . . . [M]any young people absorb that message. . . .* [W]e must keep fighting to stop these messages. That is Lambda's job." *See* http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=492 (emphasis added).

The NJSC's ruling results in the suppression of expression because Dale's forced admission to Boy Scouts would alter both the form and content of Boy Scouts' expressive role modeling. In *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), this Court stated that "[m]andating speech that a speaker would not otherwise make *necessarily alters the content* of the speech." 487 U.S. at 795 (emphasis added). Instead, "[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say *and how to say it*. . . . To this end, the government, even with the purest of motives, may not substitute its judgment as to *how* best to speak. . . . " *Id.* at 790-791 (emphasis added). Moreover, "[g]overnmental restraint on [speech] need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

In *Texas v. Johnson*, this Court, while recognizing the special place of the flag in our tradition and history, expressly declined to create an exception under the First Amendment that would allow the government to restrict expressive conduct to orthodox viewpoints. 491 U.S. at 418. The Court also suggested that "other concepts virtually sacred to our Nation as a whole," such as the state's interest in preventing discrimination, may be questioned "in the marketplace of ideas" and cannot be used to override the supremacy of the First Amendment. *Id.*

The present case raises serious issues of state-mandated censorship precisely because of the controversial nature of Boy Scouts' definition of what is "morally straight." "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society

finds the idea itself offensive or disagreeable." *Id.* at 414. "[T]hat the government may not prohibit expression simply because it disagrees with its message, is *not dependent on the particular mode in which one chooses to express an idea.*" *Id.* at 416 (emphasis added). Accordingly, the government may not "ensure that a symbol be used to express only one view of that symbol or its referents." *Id.* at 417.

The role of Scoutmaster is clearly symbolic in large measure. Hence, to deny the symbolic nature of Boy Scouts' role modeling arguably limits the number of messages that can be conveyed through Scoutmaster role modeling and amounts to a limitation on speech. "To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries." *Id.*

Boy Scouts clearly seek to control the messages they send to youth and the public through their unique emphasis on role modeling. Choosing a role model in such a context is just as vital to Boy Scouts' expressive purposes as choosing their speakers or their speech at a Court of Honor. Thus, when the state seeks, as in this case, to dictate who may occupy role modeling positions, there is a great danger that it may be substantially altering both the *form* and the *content* of such expression.

It is precisely in the area of governmental regulation of expressive conduct through public accommodation statutes that the danger of ideological constraint is high, especially if the nexus between the expressive nature of the activity and the interest being regulated is not well understood. Since Boy Scouts seek to teach their messages and values *by quiet role modeling* and not by boisterous debate, there is a great danger that outsiders (including the state) may interpret such a position as no

position at all, as the NJSC has done in this case. However, this does not mean that such quiet advocacy is not worthy of protection under the First Amendment.

In related contexts involving similar expressive associations, role modeling has already been recognized as a defense to application of state and federal antidiscrimination laws where private youth clubs have terminated adult employees who seek to model alternative sexual lifestyles. *See, e.g., Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697, 701-702 (CA8 1987) ("to permit single pregnant staff members to work with the girls would convey the impression that the Girls Club condoned pregnancy for the girls in the age group it serves"); *Harvey v. YWCA*, 533 F.Supp. 949, 952 (W.D.N.C. 1982) (rejecting a pregnancy discrimination claim of employee who was fired because she wished to offer herself as role model of the "alternative lifestyle" of unwed pregnancy to young women, which was "contrary to the [YWCA's] purpose"). *Cf. Fricke v. Lynch*, 491 F.Supp. 381 (D.R.I. 1980) (holding that role modeling example by gay male who merely attended high school prom with male date was "political statement" which constituted "protected speech").

The danger of state-mandated orthodoxy is especially high in this case because there remains a strong likelihood that requiring admission of openly gay Scoutmasters will confuse both the Scouts and the community as to what message Boy Scouts are really sending. For example, even if openly gay persons promised to teach only Boy Scouts' viewpoint on sexual morality, their contradictory example *could lead to a logical conclusion in the minds of young Scouts* and other observers of *"do as I say, not as I do."* Such a message would completely undermine the pedagogical value of role modeling as well as destroy the moral teaching against homosexual conduct. Therefore, the state's attempt to dictate appropriate role models in

this case is little different than, for instance, a state regulation requiring non-celibates to be admitted as Catholic priests.

Based on the foregoing, there is a great likelihood that the NJSC's ruling, if left intact, will be disruptive of core First Amendment expression.

III. THE NJSC'S JUDGMENT MUST BE REVERSED BECAUSE IT ASSUMES THAT THE RIGHT OF EXPRESSIVE ASSOCIATION ONLY APPLIES TO VIEWPOINTS WHICH ARE SHARED UNIVERSALLY BY THE ASSOCIATION'S MEMBERS AND IT FAILS TO RECOGNIZE THAT THE RIGHT OF SPEAKER'S AUTONOMY IS NOT LIMITED TO CONSISTENT, DISTINCT OR ARTICULATE MESSAGES

The NJSC's decision below also demands review because it denigrates the principle established in *Hurley* that the right of speaker's autonomy is not limited to consistent, distinct or articulate messages. The NJSC appears to have mistakenly assumed that members of Boy Scouts must universally have as a "shared goal" the "view that homosexuality is immoral" in order for that viewpoint to achieve any constitutional protection. *Dale, supra,* 160 N.J. at 613. The NJSC concluded that "Boy Scouts' religious sponsors differ in their views about homosexuality" and, therefore, "it appears that *no single view on this subject functions as a unifying associational goal* of the organization." *Id.* at 615 (emphasis added). The NJSC's limited view of the rights of speech and expressive association in this regard were clearly rejected in *Hurley*.

Notwithstanding the fact that the *Hurley* parade had "multifarious" and "conflicting" voices, this Court ruled that it was, nevertheless, still an expressive association entitled to First Amendment protection. *Hurley,* 515 U.S.

at 562, 569. Unlike Boy Scouts, the parade organizers "had no written criteria and employed no particular procedures for admission, voted on new applications in batches, had occasionally admitted groups who simply showed up at the parade without having submitted an application, and did 'not generally inquire into the specific messages or views of each applicant.' " *Id.* at 562 (citations omitted). These facts did not diminish their First Amendment right to exclude from the parade individuals bearing an undesirable message. Since the record in this case discloses that Boy Scouts are much more selective and have a clearer sense of expressive purposes, the protection from government interference should be even greater here.

Furthermore, there are important policy reasons why the right of expressive association should not be limited to viewpoints in which the members of an association universally agree. As a practical matter, such a limitation would so limit the right of expressive association as to make it meaningless to any large organization. There are many large private groups in this country which lack "genuine selectivity" and contain many members whose "messages" contradict each other.[9] For example, only two

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[9] For example, the American Bible Society, American Mizrachi Women, Inc., Baptist World Alliance, Catholic Relief Services, Christian Records Services, Inc., Ecumenical Association For Housing, Episcopal Community Services, Girl Scouts of the U.S.A., Graduate Theological Union, Jewish Community Centers Association of North America, The Jerusalem Fund of Aish HaTorah, Jewish Vocational and Career Counseling Service, Lutheran World Relief, Inc., Masonic Lodges, The Salvation Army, The Society For The Propagation Of The Faith, Union of American Hebrew Congregations, Union Rescue Mission, and Young Women's Christian Association. *See The Guide to Gifts and Bequests, 1995-1997: A Directory of Philanthropically Supported Institutions* (1995) at 23-239.

generations ago, the Democratic Party had some members who wanted to enact extensive civil rights legislation (such as Senators Hubert Humphrey and Paul Douglas) and other members who believed with equal fervor in segregation (such as Senator Richard Russell). The Democratic Party also did not have (and still does not have) a consistent way of selecting its members. Merely because the Democratic Party included members who believed in segregation as well as those who wanted extensive civil rights laws enacted does not mean that the First Amendment right of expressive association does not apply to the Democratic Party and its chosen platform. This Court in *Hurley* clearly rejected the view limiting expressive association rights to small homogeneous groups with narrow viewpoints or rigid rules of selection. Thus, the NJSC's decision below directly conflicts with this Court's opinion in *Hurley* regarding the applicability of expressive association rights to large and diverse private associations.

IV. THIS COURT SHOULD RESIST THE TEMPTATION TO RESTRICT RIGHTS OF SPEECH OR EXPRESSIVE ASSOCIATION IN THIS CASE BECAUSE SUCH RESTRICTIONS WILL ULTIMATELY WEAKEN THE RIGHT OF ALL PERSONS TO SPEAK OR ASSOCIATE FOR EXPRESSIVE PURPOSES, ESPECIALLY THE RIGHTS OF GAY AND LESBIAN GROUPS AND INDIVIDUALS

This amicus respectfully submits that this Court should resist efforts from either side of the political spectrum to compel ideological orthodoxy, especially when it is directed against expressive associations. Far from vindicating the rights of homosexuals, a ruling which undermines the concept of expressive activity and association in this case may lay the groundwork for denial of First

Amendment rights of gays and lesbians in other cases where such a doctrine works in their favor.

For example, there is a strong argument to be made for the contention that the First Amendment has long been the strong ally of gays and lesbians. William B. Rubenstein, the director of the ACLU's Lesbian and Gay Rights Project, has written:

> " . . . [I]n the immediate aftermath of Stonewall, a *series of First Amendment cases* challenged *government* restrictions on lesbian and gay organizations. For example, there is a whole line of cases that traces the formation of lesbian and gay student groups on college campuses and these groups' fights for university recognition. Without exception, the final decisions in each of these cases vindicated the rights of the lesbian and gay litigants. . . .
>
> "These cases are mirrored by similar cases outside the university that also uphold the association of lesbians and gay men *on First Amendment grounds* and ranged from First Amendment protections for gay bars to the protection of a gay high school student to bring a male date to his high school prom. Similarly, *the First Amendment* has been used to prohibit *governmental* publications from denying the existence of lesbian and gay groups and events.
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> . . . .
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> "This is not to say that the First Amendment has always worked perfectly for lesbians and gay men. There are a number of serious internal and external limitations on its applicability. First, the *First Amendment is triggered only where 'state action' exists*, although anti-gay silencing is not so limited. *Instances of private censorship* – an encyclopedia's failure to include an entry on gay life, for example – *are not actionable* . . .

> " . . . [T]he *First Amendment has been the only consistent friend of lesbian and gay rights litigators* since Stonewall. With rare exceptions, when a case is properly framed as a First Amendment case, lesbian and gay plaintiffs prevail. . . . The First Amendment is premised upon an ideal – currently absent from Fourteenth Amendment jurisprudence – that the judiciary should protect those ideas it finds deplorable. It finds ours deplorable, but has, in a series of important cases, protected us nonetheless."

William B. Rubenstein, *Since When Is the Fourteenth Amendment Our Route to Equality? Some Reflections on the Construction of the 'Hate-Speech' Debate from a Lesbian/Gay Perspective* in *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties* 286-88 (1994) (emphasis added) (footnotes omitted).

Since the First Amendment has been the faithful ally of gays and lesbians, there exists a great danger in cutting back its protections, even if it is being used as a defense against a gay plaintiff. Mr. Rubenstein articulately describes this danger:

> "I am cautious, first, because *allowing limitations on free speech might well limit our ability to speak freely*, and in this instance, therefore, *particularly limit our ability to come out, to undertake the very act of self-identification central to overcoming lesbian/gay oppression*. Second, I am also cautious because I worry that allowing limitations on the primary instrument of gay equality may well limit the equality itself.
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> . . . .
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> "In sum, *my experience litigating on behalf of lesbians and gay men makes me reluctant to be a party to placing limitations on the First Amendment* – and this is my main point. I hesitate to be a party to limitations on the First Amendment . . . because *the First Amendment is our instrument, at present our strongest tool, of constitutional equality. It's what we've got and I believe we should guard it carefully." Id.* at pp. 291-92 (emphasis added) (footnote omitted).

Interestingly, in a footnote, Mr. Rubenstein *concedes the fact that the Boy Scouts are exercising First Amendment rights* when they exclude gays from troop leadership positions. *Id.* at 287, 297 n.26. He appears not to be troubled by such a concession because of his overall theme that strengthening First Amendment rights in general will ultimately assist gay and lesbian rights.

This is partly because a ruling in favor of the Boy Scouts will not lead to a general undermining of legal protections for gays and lesbians. Hotels, restaurants, and other commercial establishments rarely, if ever, exist for an expressive purpose. Unlike the Boy Scouts, the purpose of most commercial establishments is to make a profit, not a moral point. It simply strains credibility to suggest that most, or even many, businesses exist to teach their customers, clients, or membership the virtues of traditional fatherhood and family values. Therefore, their conduct can be constitutionally regulated in conformity with the civil rights laws. Furthermore, even if some expressive businesses do exist, the small limitation on antidiscrimination laws made necessary to guard First Amendment expression will only advance the civil liberties of all citizens.

By contrast, a ruling against the Boy Scouts in this case would seriously weaken gay and lesbian rights in other cases. For example, the case of *Fricke v. Lynch*, 491 F.Supp. 381 (D.R.I. 1980), is a compelling example of how cutting back on the right of expressive role modeling in this case may unwittingly *reduce* gays' and lesbians' First Amendment rights in other cases. In *Fricke*, the federal

district court ruled that a gay teenager was engaging in protected expressive activity when he attended his public high school prom with a male date. The unwillingness of the Court in this case to recognize the expressive nature of the Boy Scouts' role modeling may thus, ironically, strengthen arguments that gays and lesbians who attend proms with same-sex partners are likewise not engaging in protected expressive activity.

Mandating the acceptance of openly gay Scoutmasters in this case might also adversely affect the ability of activist gay organizations to refuse the membership applications of "born again" Christian fundamentalists who are opposed to the founding purposes of the gay club and who wish to use their membership to "reform" the gay club from within. Allowing such intrusions actually implements a false notion of societal "equality" by attempting to internally "diversify" expressive associations in a way which dilutes or alters both the content and impact of the association's message.

The affected First Amendment rights would not necessarily stop at prom dates and associational rights. In *Gay Students Organization of the University of New Hampshire v. Bonner*, 509 F.2d 652 (CA1 1974), the issue was whether a state university could bar a gay student organization from sponsoring "social events," such as dances and parties. The court ruled in favor of the homosexual student association on First Amendment grounds: "Considering the important role that social events can play in individuals' efforts to associate to further their common beliefs, the prohibition of all social events must be taken to be a substantial abridgement of associational rights, even if assumed to be an indirect one." *Id.* at 659-60. The court emphasized the importance of the exchange of ideas occurring "in an informal atmosphere." *Id.* at 660. Thus, in *Bonner*, an expansive view of First Amendment

"associational rights" which includes "conduct" and "activities" such as parties and dances resulted in more, not less, protection of a gay association from capricious state regulations.

One legal commentator eloquently described the importance to the gay rights movement of not limiting what is defined as expression:

> "*Homosexual conduct*, from public hand-holding and kissing by same-sex couples to private sexual conduct, *fosters the diverse polity that the First Amendment envisions*. Public *expression of same-sex intimacy is as important* a critique of gender assumptions and gender roles in American society *as any published treatise*. It is therefore not only individually expressive, but also socially valuable under the robust pluralism endorsed in Sullivan. The fact that *gestures like kissing and hand-holding are symbolic of ideas and attitudes* rather than literal statements of position in a debate does not diminish their importance. The *public debate has* never been limited to books, articles, letters to the editor, speeches, and signs; it has *always included symbolic gestures* such as dancing, visual art, advertising imagery, public demonstrations, clothing, and physical conduct." (William David Cole & William N. Eskridge, *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 Harv. C.R.-C.L. L.Rev. 319, 328-29 (1993) (emphasis added).)

If the public debate has always included such expressive conduct as dancing, imagery, and physical conduct, then there is no reason to exclude expressive role modeling from the categories of protected expression. However, if the Court takes the rigid position advocated by Dale that role modeling is mere conduct that may be regulated so long as no "oral expression" or "advocacy" is

involved, then gay plaintiffs who seek to rely on the First Amendment based primarily on their expressive *behavior* will encounter an extremely difficult legal battle and may find their own expressive activities being restricted unless such constitutional rights are clearly protected. Thus, if Dale prevails in this case, it may prove to be a Pyrrhic victory indeed for homosexuals everywhere and may actually blunt their best weapon in the fight for civil rights – the First Amendment.

V. THIS COURT SHOULD ENSURE THAT THE SCOPE OF EXPRESSIVE ASSOCIATION RIGHTS ARE NOT INTERPRETED TOO NARROWLY SO THAT STATE AND LOCAL LAWMAKERS ARE NOT DISCOURAGED FROM PASSING NEEDED LEGISLATION TO PROTECT MINORITIES SUCH AS GAYS AND LESBIANS

Several recent commentators have criticized this Court's opinion in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) as unduly restrictive of the right of expressive association. *See, e.g.*, Comment, *Civil Rights – Public Accommodation Statutes – New Jersey Supreme Court Holds That Boy Scouts May Not Deny Membership To Homosexuals – Dale v. Boy Scouts of America, 734 A.2d 1196 (N.J. 1999), Petition for Cert. Filed, 68 U.S.L.W. 1083 (U.S. Oct. 25, 1999) (No. 99-699)*, 113 Harv. L.Rev. 621 (1999) ("the Supreme Court should revisit Roberts to develop a broader and more accurate association test"); David E. Bernstein, *Sex Discrimination Laws Versus Civil Liberties*, 1999 Univ. Chi. Legal Forum 133, 166 ("ever since *Roberts* was decided, litigants and courts have cited it for the proposition that antidiscrimination laws, no matter how trivial, should trump federal constitutional rights").

Some suggested resolutions include creating a "commerciality test" which would recognize that "businesses and facilities have attenuated intimate and expressive

interests because they promote professional, not personal, relationships and do not ordinarily advocate social policies." (Comment, *supra*, 113 Harv. L. Rev. at 625.) While the commerciality test may come closer to protecting the broad spectrum of cultural interests that are not adequately protected under the *Roberts* test, it may still be inadequate because the line between commercial associations and ideological organizations is not always easily drawn (*e.g.*, kosher food processing companies). The commerciality test, by itself, is suspect because it appears to merely constitutionalize public accommodations analysis.

Even if this Court decides not to revisit the *Roberts* test, the present case is still quite distinguishable from the facts in *Roberts*. A close reading of this Court's opinion in *Roberts* and in *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), shows that requiring full membership privileges for women in those cases did not significantly affect the ideological or philosophical character of the Rotary Club or the Jaycees. In *Rotary Club*, this Court specifically found that the Rotary Club allowed women *to attend* their meetings and *to participate* in many of their activities. 481 U.S. at 549 n.8. In *Roberts*, the court found that the Jaycees allowed women to be "associate members." 468 U.S. at 613.

By allowing women to openly participate in their meetings or to occupy second class membership status, the Rotary Club and the Jaycees showed that they did not consider women, as a group, to be "individuals with ideologies or philosophies different from those of its existing members." *Id.* at 627. Requiring these clubs to allow women *full* participation or membership status equal to men therefore did not significantly interfere with or impede the right of expressive association because *these clubs already allowed women to participate in a significant way* and because *symbolic inclusion of women, as a group,*

did not significantly alter the form or content of the expressive interests of these clubs.[10]

By contrast, the basis for refusing Dale's application in this case is clearly ideological. The Boy Scouts' selection criteria is restrictive and ideologically-oriented. All members, both youth and adult leaders, must outwardly subscribe to the Scout Oath and Scout Law, which require the members to be "morally straight" and "clean," a requirement which the record shows has been consistently interpreted by the Boy Scouts for over 80 years as meaning that a scout leader must not outwardly practice or advocate homosexuality. (JA 457-459.)

Unlike the merely second-class treatment of women participants in the Rotary Club and Jaycees cases, above, the Boy Scouts do not in any way encourage openly homosexual persons to participate in their meetings and functions. Thus, openly gay persons are not merely made second-class members by Scouting. Such a total exclusion is consistent with an ideological exclusion.

Furthermore, the trial court concluded that "[t]he consequences of restoring Dale to a position of adult leadership would be devastating to the essential nature of scouting." (223a.) The record in this case shows that introduction of homosexual role models would likely impact Scouting's ideological foundations and support, leading to possible withdrawal of sponsorship by at least some religious organizations (*see, e.g.*, JA 712-713), unlike

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[10] There is no indication in either the *Roberts* or the *Rotary Club* opinions that the Jaycees or the Rotary Club were engaging in expressive role modeling or that their rules reserving full membership privileges only to males were *intended to communicate a message*. Thus, the male-only aspects of both these clubs would fail the "intent to convey a particularized message" prong required to show expressive activity, as laid down in *Texas v. Johnson, supra*, 491 U.S. 397, 404.

the mere promotion of women to full membership status in *Rotary Club* and *Roberts*, which had no such impact.

The NJSC's judgment in this case goes far beyond the original intent of most public accommodations laws which merely require equal access to public accommodations when arbitrary exclusion of minorities is unrelated to constitutionally-protected expression. The ruling below is in direct contradiction to a long constitutional tradition which seeks to preserve "political and cultural diversity" by strengthening, not weakening, the exclusionary rights of expressive associations. *See Roberts, supra*, 468 U.S. at 622 (citing numerous cases).

Accordingly, a narrow interpretation of expressive association rights in this case may actually discourage state legislators, who might be inclined otherwise, from expanding public accommodations protections for fear of negatively impacting social and cultural associations with expressive interests. Therefore, by interpreting expressive association rights expansively in this case, the Court will actually be fostering cultural diversity and encouraging the expansion of public accommodations protections for minority groups such as gays and lesbians.

CONCLUSION

This amicus respectfully submits that this Court should overturn efforts from any part of the political spectrum to compel ideological orthodoxy, especially when it is directed against expressive associations. Far from vindicating the rights of homosexuals, a ruling which undermines the right of expressive association in this case may substantially chill the First Amendment rights of all citizens, including those of homosexuals, and "will permit the government to acquire ever more power for itself at the expense of individual autonomy and civil

society." David E. Bernstein, *supra*, 1999 Univ. Chi. Legal Forum at 196.

Respectfully submitted,

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